UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ELMHURST DAIRY, INC., Respondent, v. MILK WAGON DRIVERS AND DAIRY EMPLOYEES, LOCAL 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Party.	Case No. 29-CA-090017

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The Acting General Counsel of the National Labor Relations Board (the "Board") issued a Complaint on December 4, 2012 alleging that Elmhurst Dairy, Inc. ("Elmhurst" or the "Company") violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act (the "Act") by: (1) laying off unit employees without prior notice to Milk Wagon Drivers and Dairy Employees, Local 584, International Brotherhood of Teamsters ("Local 584" or the "Union") in contravention of the parties' layoff procedure and without affording Local 584 an opportunity to bargain over the layoff decision or the effects of that decision; and (2) notifying affected employees that it would pay the first six months of COBRA health insurance premiums, again without affording Local 584 an opportunity to bargain.

Elmhurst denies that it violated the Act by laying off certain unit employees or effectuating the layoff in the manner that it did. In the Complaint, the Acting General Counsel references a single contractual layoff provision that does not even apply to the affected employees. In doing so, he inexplicably ignores other collectively bargained provisions that dictate the process for laying off the relevant group of employees and the effects of such decisions. Elmhurst followed these other provisions, which clearly and unmistakably waive Local 584's right to bargain over the subject of layoffs. Elmhurst also denies that it deprived Local 584 of an opportunity to bargain over the proposed health insurance extension for laid-off employees. Local 584 was notified of this proposed change two weeks before it was intended to take effect, but never request an opportunity to bargain. To the contrary, it took affirmative steps to implement the health insurance extension, waiving its right to bargain over the proposal.

Elmhurst submits this memorandum of law in support of its motion for summary judgment filed pursuant to Section 102.24 of the Board's Rules and Regulations. Elmhurst

respectfully asks that the Board defer the allegations in the Complaint to the parties' contractual grievance procedure pursuant to Collyer Insulated Wire, 192 NLRB 837 (1971), and United Technologies Corp., 268 NLRB 557 (1984), absent dismissal on the merits.

STATEMENT OF FACTS

A. The Parties' Negotiating History

Elmhurst is engaged in the business of milk processing, with operations including but not limited to the pasteurization, packing, selling and delivery of milk throughout New York City and surrounding areas. (Affirmation of Robert A. Doren, Esq., dated December 21, 2012 ("Doren Aff."), ¶3). Local 584 is the exclusive bargaining representative of utility, maintenance and pasteurizing employees and drivers employed by Elmhurst. (Id.,¶4).

For many years prior to 2007, Elmhurst was a member of a multi-employer association, the Milk Industry Labor Association of New York ("MILA"). (Id., ¶5). As a member of MILA, Elmhurst was bound by collective bargaining agreements negotiated between the association and Local 584, including a collective bargaining agreement in effect from July 1, 2005 through June 30, 2007 (the "2005-2007 MILA Agreement"). (Id., ¶6; Exh. A). In 2007, Elmhurst timely withdrew from, and ceased being a member of, MILA and agreed to negotiate with Local 584 on a single employer basis. (Id., ¶7).

On July 18, 2007, Elmhurst and Local 584 entered into a new collective bargaining agreement, effective from July 18, 2007 to August 31, 2010 (the "Elmhurst 2007-2010 Agreement"). (Id., ¶8; Exh. B). As a result of the 2007 negotiations, Elmhurst's bargaining unit employees were split into two groups based on whether they were hired before July 18, 2007, or on or after that date. (Id., ¶9). Employees hired before July 18, 2007, referred to by the parties as "Existing Employees," remained subject to the terms and conditions set forth in the 2005-

2007 MILA Agreement as amended by successor agreements between MILA and Local 584. (Id., ¶9; Exh. C). Employees hired on or after July 18, 2007, referred to as "New Hires," were subject to the terms and conditions set forth in the Elmhurst 2007-2010 Agreement itself. (Id., ¶9). This bifurcated system was memorialized in the Elmhurst 2007-2010 Agreement, which stated:

> Employees on the Employer's payroll prior to July 18, 2007 ("Existing Employees"), shall except as provided in this Agreement continue their employment under the terms and conditions provided for by the Collective Bargaining Agreement between Employer and the Union which expired July 1, 2007, 12:01 a.m. [the MILA Agreement] (brackets added).

(Id., ¶10; Exh. B, ¶28).

Since entering into the 2007-2010 Agreement, Elmhurst and Local 584 have consistently applied and re-confirmed this bifurcated system. (Id., ¶11). On October 18, 2008, Elmhurst and Local 584 negotiated an agreement modifying the Elmhurst 2007-2010 Agreement in regards to the installation of security cameras, a wage increase, a "buy out program" and a clothing allowance. (Id., ¶12; Exh. D). This agreement continued to distinguish between "Existing Employees," which the parties defined to mean "all employees on the payroll of Elmhurst prior to July 18, 2007," and "New Hires," which included "all employees on the payroll of Elmhurst hired after July 18, 2007…." (Id., ¶13; Exh. D, ¶2).[1]

Further evidencing that two collective bargaining agreements defined the terms and conditions of bargaining unit employees are notices sent by Elmhurst to the State and Federal

[1] Elmhurst and Local 584 differentiated between "Existing Employees" and "New Hires" when setting terms and conditions of employment in the October 18, 2008 agreement, including by making the "buy out program" available only to "Existing Employees," whereas the clothing allowance applied to both "New Hires" and "Existing Employees." (Doren Aff., ¶14; Exh. D).

Mediation Services on June 22, 2010 pursuant to Section 8(d) of the Act, advising that the two labor contracts would expire August 31, 2010. (Id., ¶16). The notices provided:

> We represent Elmhurst Dairy, Inc. in the renegotiation of the Company's collective bargaining agreements which are set to expire on August 31, 2010. The Company's first collective bargaining agreement is a multi-employer agreement with the Milk Wagon Drivers and Dairy Employees Local 584 and the Metropolitan Dairy Employers of the City of New York. The second collective bargaining agreement is the Company's local agreement with the Milk Wagon Drivers and Dairy Employees Local 584. Enclosed are two FMCS Form F7 notices pursuant to the statutory notice obligations under Section 8(d) of the National Labor Relations Act.

(Id., ¶16; Exh. E).

Elmhurst and Local 584 ultimately reached agreement on the terms of a new contract in September 2011, after fourteen months of negotiations. (Id., ¶18). The resulting memorandum of agreement, dated September 21, 2011, continued the bifuracted system whereby unit employees hired before July 18, 2007 had different terms and conditions than employees hired on or after that date:

> Employees who are members of the Union on the Employer's payroll prior to July 18, 2007 ("Existing Employees") shall, except as modified herein, continue their employment under the terms and conditions provided for by the collective bargaining agreement between the Union and MILA in effect September 1, 2011 to August 31, 2015.[2]

(Id., ¶¶ 19-20, Exh. F).

As part of the same negotiations, Elmhurst and Local 584 signed an additional agreement concerning bargaining unit employees' terms and conditions of employment. (Id., ¶22). This

[2] A copy of the MILA agreement referenced in the September 21, 2011 memorandum of agreement, i.e., the agreement "in effect September 1, 2011 to August 31, 2015" (the "2011-2015 MILA Agreement"), is the agreement between Local 584 and MILA that was in existence in 2005-2007 (see Doren Aff., Exh. A), later amended in 2007 and 2008 (see Doren Aff., Exh. C), and further amended by the memorandum of agreement dated July 14, 2011 (see Doren Aff., Exh. G).

agreement, signed by Local 584 on October 13, 2011 and by Elmhurst on October 27, 2011, modified the terms of the 2011-2015 MILA Agreement with respect to the wages of employees hired before July 18, 2007. (Id., ¶¶23-24; Exh. H, ¶1a). Once again, the parties referred to two collective bargaining agreements: one "covering Union employees hired prior to July 18, 2007" and the other "applicable to employees hired on or after July 18, 2007." (Id., ¶24; Exh. H, ¶1).

Ultimately, on October 30, 2011, Elmhurst and Local 584 incorporated the agreed-upon terms into a new collective bargaining agreement effective from September 1, 2010 through August 31, 2015 (the "Elmhurst 2010-2015 Agreement"). (Id., ¶25; Exh. I). The Elmhurst 2010-2015 Agreement covers Elmhurst's utility, maintenance and pasteurizing employees, but, as before, does so through a bifurcated system. (Id., ¶26). Specifically, the Elmhurst 2010-2015 Agreement includes a provision entitled "Existing Employees" which states:

> Employees who are members of Local 584 on the Employer's payroll prior to July 18, 2007 ("Existing Employees") shall, except as agreed to by the Union and Elmhurst Dairy as provided in this agreement, continue their employment under the terms and conditions provided for by the collective bargaining agreement between the Union and MILA in effect September 2, 2011 to August 31, 2015.

(Id., ¶26; Exh. I, ¶29). Thus, as under the Elmhurst 2007-2010 Agreement, bargaining unit members with dates of hire before July 18, 2007 continued to be subject to the terms and conditions prescribed in the MILA Agreement, unless the parties specifically agreed otherwise. (Id., ¶27). For bargaining unit members hired on or after July 18, 2007, the terms and conditions set forth in the Elmhurst 2010-2015 Agreement govern. (Id., ¶28).

B. Elmhurst's September 16, 2012 Layoff Decision

On August 20, 2012, Elmhurst notified the Union in writing of its dire economic situation and offered to meet to discuss a possible solution. (Id., ¶29). Elmhurst and Local 584 met on

August 29, 2012 to discuss several issues concerning the Company's financial standing, including Elmhurst's breach of bank covenants for a $32 million dollar debt under its loan agreement, a September 15, 2012 deadline for the Company to report its breach to the bank and present an action plan to cure its financial condition, the constant decline in sales since 2006, a buyout agreement the Company was willing to offer to "Existing Employees," and the Company's hope that one of its dealers – a MILA signatory – might be willing to employ "Existing Employees" who remained subject to the terms and condition of the MILA contract. (Id., ¶29, Exhs. J and K).

Elmhurst's proposed buyout and negotiations with the dealer to hire "Existing Employees" did not prove successful by the bank reporting date of September 15, 2012. (Id., ¶29). As such, on or about September 16, 2012, Elmhurst instituted its remaining option: layoffs from its ranks of utility employees as a result of the Company's financial condition and its need to reduce average hourly labor costs. (Id., ¶30). In order to most effectively address its economic challenges while still maintaining operations, Elmhurst chose to conduct layoffs under the contract governing bargaining unit employees hired prior to July 18, 2007, i.e., the group of bargaining unit employees who receive the higher wages and more generous benefits prescribed by the 2011-2015 MILA Agreement.[3] (Id., ¶31). Forty-two utility employees covered by the MILA contract with the least seniority were selected for layoffs in accordance with the procedures set forth under the MILA contract. (Id., ¶32; Exh. A, p. 51 (as amended in 2007 and 2008, see Doren Aff., Exh. C, and 2011, see Doren Aff., Exh. G). Fifteen more senior utility employees, maintenance employees, pasteurizers and drivers hired prior to July 18, 2007 and subject to the MILA terms and conditions of employment were not laid off. (Id., ¶32).

[3] The utility employees in question are set forth as "Group 2" within the MILA contract. (See Doren Aff., Exh. A, p. 51) (as amended in 2007 and 2008, see Doren Aff., Exh. C, and 2011, see Doren Aff., Exh. G)..

On September 16, 2012, several conversations occurred between Jay Valentine, Elmhurst's Vice President and General Manager, and Frank Wunderlich, Local 584's President, as well as conversations between counsel for the union, John Driscoll, the Company, and Robert Doren. (Id., ¶33). Mr. Wunderlich was told that the Company would offer laid off employees one week's pay in lieu of one week's notice as provided in the MILA contract's layoff provision. (Id., ¶¶33; see also Doren Aff., Exh. A, ¶4.6). He was also told that the Company was willing to pay the first six months of COBRA health insurance premiums for the individuals who were laid off. (Id., ¶33). In the afternoon of September 16, Mr. Valentine again met with Mr. Wunderlich and two other Local 584 officials, along with Mr. Doren. (Id., ¶34). The Union representatives asked how the Company proceeded with the layoff of the forty-two individuals. (Id.). In response, the Company explained that under Paragraph 29 of the Elmhurst contract, "Existing Employees" are governed by the seniority provision under the MILA agreement and that the layoffs were in accordance with the least seniority within the utility classification, as required by the MILA contract. (Id.).

During this meeting, Mr. Wunderlich confirmed that the Company was still offering to pay the first six months of the COBRA health insurance premiums for laid off employees. (Id., ¶34.a). The Company reiterated that it was. (Id.). At no time did Mr. Wunderlich or any other Union official object to this offer or otherwise demand to negotiate this or any other effect of the layoff. (Id.). In fact, Mr. Wunderlich seemed pleased that the laid off employees would receive such coverage.[4] (Id.). Local 584 then took affirmative steps to implement this proposal. (Id., ¶35). On September 17, 2012, Mr. Wunderlich and Mr. Valentine discussed the procedure for

[4] The parties contractually provide for six months health insurance coverage upon layoff for Group 1 employees – Route Craft employees. (See Doren Aff., Exh. A, p. 37). Also, the Company had provided a similar benefit under the buy-out agreement that was offered to "Existing Employees" on August 29, 2012, which two individuals accepted. (See Doren Aff., ¶29.a(3); Exh. K).

Elmhurst to make payment for the COBRA health insurance premium. (Id.). Although Mr. Wunderlich did not personally know how to accomplish this, he put Mr. Valentine in contact with Lana Gritsenko, an administrator at the Local 584 Welfare Plan to arrange for the payment. (Id.). On September 18, 2012, the Company received an invoice from the Local 584 Welfare Plan containing a bill for the COBRA payments, which was paid within twenty-four hours. (Id.; Exh. L). The Union accepted payment and, upon information and belief, took the necessary steps to implement the health insurance benefit as of October 1, 2012. (Id., ¶35).

C. Local 584's Demand To Arbitrate The Underlying Disputes

On September 19, 2012, Elmhurst received a notice from Local 584 demanding to arbitrate Elmhurst's layoff decision. (Id., ¶35; Exh. M). The Company responded on September 20, 2012 by stating that the Union's demand to arbitrate was premature since it had not filed a grievance or otherwise pursued the grievance procedure. (Id., ¶37; Exh. N). On September 25, 2012, Mr. Doren was e-mailed a notice from the American Arbitration Association ("AAA"), together with a list of arbitrators. (Id., ¶38; Exh. O). On September 26, 2012, Mr. Doren received another e-mail from AAA advising that Local 584 had withdrawn its demand for arbitration. (Id., ¶39; Exh. P). That same day, however, the Company received a grievance from Local 584 via letter dated September 24, 2012. (Id., ¶40; Exh. Q). The grievance claimed that the Company breached the collective bargaining agreement by: (1) laying off forty-two employees without notice and providing paid COBRA coverage to such employees; and (2) hiring new employees without first recalling laid off employees. (Id., ¶40, Exh. Q). According to the Union's grievance, these actions violated both the 2005-2007 MILA Agreement and the Elmhurst 2007-2010 Agreement.[5] (Id.).

[5] As noted supra at pp. 3-6, the 2005-2007 MILA Agreement and Elmhhurst 2007-2010 Agreement have been superseded by successor contracts.

On September 28, 2012, the Company answered the grievance, indicating that it did not believe it had violated the collective bargaining agreement but, pursuant to the grievance and arbitration procedure, was willing meet on October 3, 2012 to discuss various issues. (Id., ¶43; Exh. R). The Union confirmed the meeting by letter dated September 28, 2012 and reiterated that it intended to pursue its grievance. (Id., ¶44, Exh. S). The parties met on October 3, 2012 pursuant to the terms of their grievance procedure. (Id., ¶45). Following the meeting, Elmhurst issued its written response to the grievance. (Id., ¶45; Exh. T). The Union thereafter filed a demand to arbitrate with AAA, an arbitrator was selected, and the parties are proceeding to arbitration on February 26, 2013. (Id., ¶45; Exh. U).

ARGUMENT

THE ALLEGATIONS IN THE COMPLAINT SHOULD BE DEFERRED TO ARBITRATION

Elmhurst respectfully submits that the underlying disputes ought to be deferred pending resolution through the parties' collectively bargained grievance-arbitration procedure.

The United States Supreme Court and the Board have observed on numerous occasions that the NLRB should "decline to exercise its jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal labor policy would best be served by leaving the parties to other processes of law." Collyer Insulated Wire, 192 NLRB 837, 840 (1971) (citing Smith v. Evening News Association, 371 U.S. 195, 198 (1962)); see also Dubo Manufacturing Corp., 142 NLRB 431, 432 (1963) (dismissing an unfair labor practice charge involving allegations of discrimination in violation of the NLRA pursuant to the deferral doctrine).

Both federal courts and the Board have also repeatedly held that the federal labor policy, in fact, demands that the parties to a labor contract should be required to utilize the method

prescribed in the labor contract for the adjustment of grievances and disputes involving the application or interpretation of the contract. As the Board noted in one such decision:

> It is fundamental to the concept of collective bargaining that the parties to a collective bargaining agreement are bound by the terms of their contract. Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the [NLRA] for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance arbitration process is as much a part of collective bargaining as the act of negotiating the contract. In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.

United Technologies Corp., 268 NLRB 557, 559 (1984).

Applying this rationale, the courts and the Board have consistently found that whenever it appears that "… the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue … then the Board should defer to the arbitration clause conceived by the parties." Collyer Insulated Wire, 192 NLRB at 841-842 (quoting Jos. Schlitz Brewing Company, 175 NLRB 141 (1969)); see also United Aircraft Corp., 204 NLRB 879 (1973). The Board has expressly recognized that deferral is appropriate in cases involving allegations of unlawful unilateral changes. See, e.g., Wonder Bread, 343 NLRB 55, 56 (2004) citing E.I. DuPont & Co., 293 NLRB 896, 897 (1989).

In Collyer, the Board held that it will defer disputes to arbitration if: (1) the disputes arise within the confines of a long and productive collective bargaining relationship; (2) no claim is made of employer animosity to employees' exercise of protect rights; (3) the employer is willing to arbitrate the disputes; (4) the parties' contract provides for arbitration in a broad range of

disputes; and (5) the disputes are well-settled to resolution by an arbitrator. 192 NLRB 841-842. Each of these factors is met here.

First, Elmhurst and Local 584 have enjoyed a long history of collective bargaining which resulted in successive labor contracts, the most recent effective from September 1, 2010 through August 31, 2015. Second, the Complaint contains no allegation that Elmhurst bears animosity to its employees' exercise of protected rights. Third, Elmhurst has expressed a willingness to proceed to arbitration on Local 584's grievance, which is indeed scheduled for February 26, 2013. Fourth, the parties' grievance-arbitration procedure broadly covers "[g]rievances as to the meaning, interpretation or application of the provisions of [the Elmhurst 2010-2015 Agreement]…," which include the "Existing Employees" provision and, by extension, the provisions of the current MILA labor contract which sets forth terms and conditions of employment for employees hired before July 18, 2007. (See Doren Aff., Exh. I, ¶18).

Finally, the underlying disputes are well suited to resolution by arbitration. The basic controversy between the parties is whether Elmhurst has the right to conduct layoffs among only those bargaining unit employees covered by the MILA contract and pursuant to provisions therein, or whether any layoff decision must also take into account "New Hires" who are not covered by the MILA agreement. Elmhurst's position is that the parties have created two distinct groups of bargaining unit employees, each with its own set of terms and conditions of employment. The differing terms and conditions are not restricted in any way to those that might be objectively favorable to employees hired before July 18, 2007, such as higher wages or more generous benefits, but apply to all terms and conditions, including those concerning layoffs. As a result, when Elmhurst decided that layoffs were necessary, it was authorized to look towards that group of employees who were subject to the layoff provisions in the MILA contract, without

regard to the fact that there is another group of employees who are subject to different layoff provisions. The only restriction on the Company is that it implement the layoffs in accordance with the terms and conditions of the MILA agreement, which it did. This is conceptually no different from an employer making a business decision to conduct layoffs from within one bargaining unit, while another bargaining unit with different terms and conditions of employment remains unaffected.

Had the parties desired, they could have negotiated language to clearly and unambiguously establish that all bargaining unit employees will be laid off in accordance with overall seniority, regardless of hire date. Instead, they repeatedly agreed over the course of several negotiations that the terms and conditions of bargaining unit employees hired before July 18, 2007 will be prescribed by the MILA contract, and that terms and conditions of employees hired on or after that date will be covered by the collective bargaining agreement negotiated directly by Elmhurst and Local 584.

Thus, in response to the Acting General Counsel's claim that Elmhurst violated sections 8(a)(5) and 8(a)(1) of the Act by unilaterally laying off forty-two employees without notice to Local 584, Elmhurst respectfully submits that an arbitrator is in the best position to examine the parties' collective bargaining agreements and negotiating history to assess whether the Company's decision was authorized. This necessarily requires an interpretation of the "management rights" clause in the Elmhurst 2010-2015 Agreement, which states that the Company retains the right to "layoff" subject only to other provisions therein. (Doren Aff., Exh. I, ¶12). One such provision is the "Existing Employees" paragraph, which, in turn, incorporates the current MILA labor contract in relation to bargaining unit employees hired before July 18, 2007. (Id., Exh. I, ¶29). No provision requires that Elmhurst make layoff decisions based on

seniority within the entire bargaining unit, as opposed to seniority within the group of employees covered by one contract or the other.

Notably, the Complaint in this proceeding does not even mention the "management rights" or "Existing Employees" provisions from the Elmhurst 2010-2015 Agreement. Instead, it cites solely the seniority provision in that contract, which Elmhurst maintains applies only to unit employees hired on or after July 18, 2007, making it not even relevant to the underlying dispute. At the very least, it is necessary that an arbitrator review the pertinent collective bargaining agreements to assess which provisions are applicable to the underlying disputes.

A determination is also required as to whether the parties' bifurcated system allows the Company to conduct layoffs among "Existing Employees" only, as Elmhurst maintains. To decide this issue, it is necessary to consider why the parties chose to distinguish between individuals hired before and after July 18, 2007 in the first place. It also demands an examination of the parties' past practices, including whether any past practices exist concerning the treatment of "Existing Employees" versus "New Hires." In fact, the parties have consistently differentiated between the two groups for seniority purposes. (See, e.g., Doren Aff., ¶36 (discussing certain past practices of the parties' in regards to seniority rights)). Thus, the Acting General Counsel's assertion that a single seniority provision applies to all unit employees is simply mistaken.

An arbitrator is also in the best position to construe the applicable collective bargaining agreements to determine if Elmhurst has any further obligation to negotiate the effects of a layoff decision. Relevant to this determination is a clause in the Elmhurst 2010-2015 Agreement whereby the parties' acknowledged that they had an opportunity to present proposals for collective bargaining and that neither party is obligated to bargain further with respect to matters

not covered therein. (Doren Aff., Exh. I, ¶33). This provision is especially pertinent because the MILA agreement includes language that requires Elmhurst to make an additional payment to "Existing Employees" who are laid off without sufficient notice, which shows not only that the parties contemplated the Company conducting layoffs without notice, but also that they previously bargained over the effects of such decisions. (Doren Aff., Exh. A, ¶4b).

Following the September 16, 2012 layoff, Elmhurst did, in fact, make payment to laid off employees in lieu of notice as required by the MILA agreement. Local 584 has never objected to this payment, which demonstrates that it too believes the MILA contract's layoff provisions apply to employees hired before July 18, 2007. Moreover, the Acting General Counsel has not alleged that this payment-in-lieu-of-notice constitutes a unilateral change, which one would expect if the Elmhurst 2010-2015 Agreement in fact contained all the relevant terms and conditions concerning employee layoffs, as suggested by the Complaint.

Under similar circumstances, the Board has granted summary judgment motions seeking deferral of unfair labor practice charges to arbitration. In Textron Lycoming, 310 NLRB 1209 (1993), the General Counsel accused the employer of violating sections 8(a)(5) and 8(a)(1) of the Act by unilaterally modifying a five-step progressive discipline procedure set forth in a collectively bargained letter agreement. The employer refuted the claim and sought deferral on the grounds that any determination required consideration of not only the letter agreement, but of a management rights cause which gave it authority to promulgate rules and maintain efficiency. The Board agreed with the employer, finding that the parties' arbitration procedure broadly allows for the arbitration of disputes concerning contractual interpretation or application. 310 NLRB at 120. It held that deferral was appropriate because the employer "raised an issue of

contract interpretation which can best be resolved by an arbitrator with special skill and experience in deciding matters arising under established bargaining relationships." Id.

Likewise, in Inland Container Corp., 298 NLRB 715 (1990), the Board granted a motion for summary judgment and deferred to arbitration the General Counsel's claim that the employer violated Sections 8(a)(5) and 8(a)(1) of the Act by unilaterally implementing a drug testing program for employees. The Board found that the parties' collective bargaining agreement provided for resolution of disputes arising from the implementation of a company rule through arbitration, and that the drug program in question constituted such a rule. It observed that "deferral will foster the Act's mandate by requiring the parties to abide by their agreed-to method of resolving such disputes through the grievance and arbitration procedure and by encouraging them to resolve their dispute through bargaining within the grievance procedure." 298 NLRB at 716.

In both Textron Lycoming and Inland Container Corp., the Board rejected the General Counsel's argument that the dispute concerned clear and unambiguous contract language and that deferral was therefore inappropriate because no contract interpretation was required. In each case, the Board also found that there was no wholesale repudiation of the contract or the parties' bargaining relationship that might justify a decision not to defer to a contractually bargained arbitration procedure. See Textron Lycoming, 298 NLRB 716, n.3; Inland Container Corp., 310 NLRB 1211, n.8. Thus, those cases were distinguishable from the Board's decision in Oak Cliff-Golman Baking Co., where it was undisputed that the employer completed disregarded its contractual commitments and unilaterally reduced the wage rates of its bargaining unit employees. 202 NLRB 614, 616 (1973). In a de novo consideration of Oak Cliff-Golman Baking Co., the Board held that deferral was inappropriate because the employer's unilateral

action was more than a "mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship." 207 NLRB 1063, 1064 (1973). Other scenarios where the Board has refused to defer similarly involve a flagrant repudiation of the collective bargaining relationship. See, e.g., United Cerebral Palsy of New York City, 347 NLRB 603, (2006) (employer's alleged unilateral implementation of a handbook that, by its terms, supersedes all other "handbooks, management memoranda and practices" and reserves the employer's right to "change, cancel or suspend any of its personnel policies at anytime without advance notice" involves conduct "amounting to a de facto rejection of the bargaining relationship…"); New Mexico Symphony Orchestra, Inc., 335 NLRB 896, 897 (2001) (employer's failure to pay wages in a timely manner constituted an "admitted breach of the contract" which "does not involve a question of contract interpretation or require the special competence of an arbitrator").

Here, the Complaint does not allege that the alleged unilateral changes by Elmhurst amounted to a repudiation of the parties' contract or collective bargaining relationship. Rather, there exists a genuine dispute as to whether Elmhurst breached its obligations under the Elmhurst 2010-2015 Agreement and, by extension, the MILA contract, by unilaterally laying off bargaining unit employees hired prior to July 18, 2007 without notice. Elmhurst contends that its actions were authorized by, among other things, the management rights clause, the parties' adoption of a bifurcated system in relation to bargaining unit employee's terms and conditions of employment, and the provisions of the MILA contract which set forth the process for conducting layoffs among "Existing Employees" – which Elmhurst unquestionably followed. On the other hand, the Acting General Counsel focuses on a single provision of the Elmhurst 2010-2015

Agreement, in complete disregard of other relevant provisions of that contract, the MILA agreement incorporated therein, and the parties' negotiating history and past practices.

For purposes of deciding whether deferral is appropriate, it matters not which argument is more likely to prevail. As the Board noted in Caritas Good Samaritan Medical Center, the ultimate issue is whether the underlying contractual provisions are "free from ambiguity" and demonstrate a clear violation of the Act, which in this case they do not. 340 NLRB 61, 63 (2003). Elmhurst offers at least a plausible defense for its layoff decision and the implementation of that decision, all rooted in the parties' collective bargaining agreements, negotiating history and past practices. As such, the dispute as to whether Elmhurst violated the pertinent collective bargaining agreements "is classically a matter of contract interpretation, i.e., grist for an arbitrator's mill." Id.

Importantly, Elmhurst is not alone in believing that the underlying disputes are appropriately resolved by an arbitrator. On September 24, 2012, Local 584 filed a grievance challenging the Company's decision to layoff the forty-two employees without notice as well as its then still-pending proposal to pay for six months of continued health insurance coverage. (Doren Aff., Exh. Q). The parties have since selected an arbitrator and the arbitration proceeding is scheduled to convene on February 26, 2013.[6]

Hence, Elmhurst respectfully submits that the Complaint ought to be deferred to arbitration pursuant to the policies articulated in Collyer Insulated Wire. Deferral in this case would be consistent with the rationals expressed by the Board's Office of the General Counsel in General Counsel Memorandum 12-01 ("GC 12-01"), issued on January 2, 2012. GC 12-01 recognizes that "[t]he Board's doctrine of pre-arbitral deferral is principally derived from the

[6] Although the Union has since apparently chosen not to pursue the portion of its grievance concerning health insurance, (see Doren Aff., Exh. U), Elmhurst remains willing to put raise that issue before an arbitrator as well. Accordingly, deferral under Collyer Insulated Wire and United Technologies Corp. remains appropriate.

twin policy goals of promoting collective bargaining and of promoting the private resolution of disputes." GC 12-01, p. 1. It then goes on to state that "so long as an alleged violation of the Act is covered by the parties' grievance-arbitration agreement, the Board will defer the dispute to that process if certain conditions are met." (Id.). By issuing the Complaint in this case, the Regional Director for Region 29 disregarded the various policy justifications for deferral, as noted in GC 12-01:

> The Board reasons that since it is fundamental to the concept of collective bargaining that the parties to a contract be bound by the terms of their agreement, it would be detrimental to "jump into the fray" and preempt that agreement. As the Board wrote in United Technologies Corp., "dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract." Thus, adjuring the parties to seek resolution by means of their own making fosters "both the collective relationship and the Federal policy favoring voluntary arbitration and dispute settlement."
>
> There are additional rationales for deferring Section 8(a)(5) charges in particular. First, in many Section 8(a)(5) cases the issue is whether the employer had a contractual right to take the action contested, and any violation of the Act in such cases turns entirely on contract interpretation. Therefore, unlike Section 8(a)(1) and (3) cases, which require the decision maker to interpret the Act, these Section 8(a)(5) cases do not require the Board's expertise. Indeed, the Board recognized that matters of contract interpretation "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute. Furthermore, it would be particularly detrimental to the goal of promoting stable labor-management relationships through collective bargaining if the Board were to interpose itself in a matter of contract interpretation. Resolution of disputes arising out of contractual provisions are best left to the parties through the steps of the agreed-upon grievance procedure, as well as by the arbitrator specially chosen to interpret the contract.

(GC 12-01, pp. 2-3) (footnotes omitted).

In addition, as mentioned above, the parties in this case are already scheduled to arbitrate the underlying disputes barely one month after the hearing on the Complaint. To avoid unnecessary costs and potentially inconsistent results, the parties should be given the opportunity to resolve their disputes through their collectively bargained mechanism, without the Board "jumping into the fray."

In the alternative, assuming arguendo that deferral is deemed inappropriate under Collyer Insulated Wire, the Complaint should nevertheless be deferred under Dubo Mfg. Corp., 142 NLRB 431 (1963). According to the Office of the General Counsel "deferral under the Dubo policy is warranted in any dispute which is being processed through grievance procedures leading to final and binding arbitration in which it is likely that the dispute will be, or has been, submitted for arbitration…." Office of the General Counsel's Arbitration Deferral Policy Under Collyer – Revised Guidelines, p. 39 (1973). This standard has been incorporated into the NLRB Case-Handling Manual, which states in relevant part that:

> Where a deferral under *Collyer* is inappropriate, the Regional Office may, in appropriate circumstances defer a charge pursuant to the Board's decision in *Dubo Mfg. Corp.*, 142 NLRB 431 (1963) … [T]he regional office will defer under *Dubo* only if the charging party has initiated and continues to process a grievance involving the same issue.

See NLRB Case Handling Manual at 10118.1(b) (Revised 06/07).

CONCLUSION

For the foregoing reasons, Respondent, Elmhurst Dairy, Inc., respectfully requests on Order of the Board granting summary judgment and deferring the Complaint to the parties' collectively bargained grievance-arbitration procedure.

WHEREFORE, Respondent respectfully requests that the Complaint be dismissed in its entirety.

Dated: December 21, 2012

Respectfully submitted,

/s/ Robert A. Doren

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